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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92051006
Party	Defendant 12 Interactive, LLC
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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COUCH/BRAUNSDORF AFFINITY, INC.,	)	
	)	
Petitioner/Counter-Registrant,	)	
	)	
v.	)	Cancellation No. 92051006
	)	
12 INTERACTIVE, LLC,	)	
	)	
Registrant/Counter-Petitioner	)	
	)	

REGISTRANT'S RESPONSE TO PETITIONER'S MOTION TO REOPEN

In yet another attempt to forestall the Board's resolution of this matter, Couch/Braunsdorf Affinity, Inc. ("Petitioner") asks to rewind these proceedings to reopen the long-closed testimony periods to allow in additional non-probative and inadmissible hearsay. Moreover, by attaching the alleged evidence to the Motion, Petitioner attempts to put the emails before the Board in an end-run around the protections of the TTAB rules. 12 Interactive, LLC ("PerkSpot") therefore respectfully requests that the Board deny Petitioner's Motion, and order that dates set by the Board's December 9, 2011 Order remain as set.

Petitioner cites only one case for the proposition that motions to reopen testimony periods are ever appropriate, and that case is plainly distinguishable from the instant facts. Indeed, in *Wilderness Group, Inc. v. Western Rec. Vehicles, Inc.*, the parties stipulated that evidence supporting opposer's case-in-chief that arose after the close of its testimony-in-chief period could be introduced during its rebuttal testimony period. 222 USPQ 1012, fn5 (TTAB 1984). There is no case law to support the idea that evidence such as Petitioner's, allegedly arising nearly a full year after the close of Petitioner's testimony-in-chief, and after the submission of briefs on the merits, should ever be permitted.

To allow such a radical departure in this case would be highly prejudicial to PerkSpot. In deciding a motion to reopen, the Board must consider "[t]he nature and purpose of the evidence sought to be added, the stage of the proceeding, the adverse party's right to a speedy and inexpensive determination of the proceeding and the need for closure once the trial period has been completed (barring some compelling reason to reopen)..." *Canadian Tire Corp. v. Cooper Tire & Rubber Co.*, 40 U.S.P.Q.2d 1537, 1539 (Comm'r 1996) (denying request to reconsider denial of motion to reopen testimony period). Here, the purpose of the evidence is merely cumulative of the hearsay, alleged actual confusion evidence already presented by Petitioner. The stage of this proceeding is obviously very late—both Petitioner and PerkSpot have presented their initial trial briefs, with only limited rebuttal briefing remaining. Equity requires closure of the evidence admitted in this proceeding, particularly after PerkSpot has presented its arguments. Further delay would be prejudicial to PerkSpot's right to a speedy and inexpensive determination of the proceeding. *See Harjo v. Pro-Football Inc.*, 45 U.S.P.Q.2d 1789, 1790 (denying motion to reopen testimony period to introduce evidence arising after the close of all testimony periods, but before any briefing had begun). Additionally, this matter has been pending for over three years, preventing PerkSpot from having repose with regard to its trademark, one of its most valuable assets.

Furthermore, Petitioner's proposed additional evidence is non-probative. The testimony of Mr. Dow would not prevent the string of emails in question from being hearsay. Where actual confusion evidence is only hearsay, it is entitled to little or no weight. *Georgia-Pacific Corp. v. Great Plains Bag Co.*, 614 F.2d 757, 204 USPQ 697, 701 (CCPA 1980) (upholding Board decision that Petitioner's evidence of actual confusion constituted hearsay, disregarding the same, and holding that there was no likelihood of confusion). Introduction of this evidence via Mr. Dow's testimony, rather than via the testimony of the allegedly confused third party, would

provide PerkSpot with no opportunity to cross-examine the allegedly confused person. *See id.; Duluth News-Tribune v. Mesabi Pub'g. Co.*, 84 F3d 1093, 38 USPQ2d 1937, 1941 (8th Cir. 1996) ("vague evidence of misdirected phone calls and mail is hearsay of a particularly unreliable nature given the lack of an opportunity for cross-examination of the caller or sender regarding the reason for the 'confusion'"). Furthermore, Mr. Dow is Petitioner's founder and president, and any evidence he presents must therefore be viewed with skepticism. *Citizens Fin. Grp., Inc. v. Citizen's Natn'l Bank of Evans City*, 383 F.3d 110, 72 USPQ2d 1389, 1399 (3rd Cir. 2004) ("In general, 'actual confusion' evidence collected by employees of a party in a trademark action must be viewed with skepticism because it tends to be biased or self-serving.").

Finally, Petitioner should not be permitted to take extra time to craft its response to PerkSpot's arguments in the counterclaim by means of this baseless Motion. As stated above, PerkSpot has a right to a speedy determination of this matter, and this further attempt by Petitioner to delay final decision should not be permitted. For the foregoing reasons, PerkSpot respectfully requests that the Board deny Petitioner's motion to reopen its testimony period, and decline to reset the dates as previously set by the Board's December 9, 2011 Order.

Respectfully submitted,

Dated: June 12, 2012

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CERTIFICATE OF SERVICE

I, Katherine Dennis Nye, an attorney, state that I served a copy of ***REGISTRANT'S RESPONSE TO PETITIONER'S MOTION TO REOPEN*** upon counsel for Petitioner-Counter Registrant:

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via First Class U.S. Mail and email on this 12th day of June 2012.

/Katherine Dennis Nye/
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